

ORIGINAL

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR



Office of Cable Television & Telecommunications  
2217 14th Street, N.W.  
Washington, D.C. 20009

December 13, 1999

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Mr. William E. Kennard  
Chairman  
Federal Communications Commission  
445 12th St., S.W.  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

RE: Comments in WT Docket No. 99-217, CC Docket No. 96-98

Dear Chairman Kennard:

The District of Columbia government strongly discourages any action by the Federal Communications Commissions to preempt local communities' authority to manage and control the revenues that stem from public rights of way. Several telecommunications companies have insisted that the imposition of uniform local guidelines would more than likely aid competition by making entry to the market easier for new telecommunications companies. However, there has been no showing by telecommunications companies that their growth heretofore has been stifled by local right-of-way tax policies.

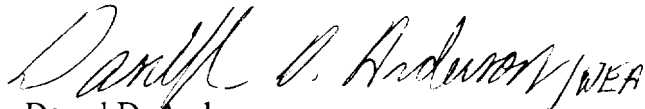
You may be aware that the District of Columbia has not yet adopted a right-of-way management ordinance that requires telecommunications companies to pay for the use of our local rights-of-way. While telecommunications companies are required to pay a fee before they are provided a license to utilize our rights-of-way, the current fee structure in no way represents the cost the city absorbs for maintaining our streets and public rights-of-way. The current licensing fee is shamefully nominal. As such, several companies have taken advantage of the relaxed right-of-way management environment in the District of Columbia. In your travels throughout the District, I am sure you have experienced the horror of driving over uneven street cuts and potholes that have resulted from poor repair work done by telecom companies.

Fortunately, the District of Columbia is developing legislation to address this concern. With the imposition of more refined construction and repair requirements as well as reasonable compensatory fees for the use of the public rights-of-way, District residents will begin to see improvements in our local streets and thoroughfares. However, without authority to require appropriate compensation, local communities would be hampered in their ability to manage and maintain the public rights-of-way. Accordingly, the authority to require compensation for the use of public rights of way must remain within the control of local communities to ensure appropriate remuneration. The 1996

Telecommunications Act protects the rights of local municipalities to demand fair and reasonable compensation for the use of public rights-of-way and there is no reason to stray away from this policy.

I appreciate this opportunity to submit comments regarding this issue and I hope the Commission will continue to exercise respect for the numerous local communities throughout the United States that effectively manage their public rights-of-way.

Sincerely,

  
Darryl D. Anderson  
Executive Director

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications	)	
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking	)	
To Amend Section 1.4000 of the	)	
Commission's Rules to Preempt	)	
Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas	)	
Designed to Provide Fixed Wireless	)	
Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rulemaking and	)	
Amendment of the Commission's Rules	)	
To Preempt State and Local Imposition of	)	
Discriminatory and/or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications	)	
Act of 1996	)	
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**REPLY COMMENTS OF THE DISTRICT OF COLUMBIA OFFICE OF CABLE  
TELEVISION & TELECOMMUNICATIONS**

## SUMMARY

Introduction. The development of telecommunications competition is an important goal.

Citizens desire the new services and benefit from competition. In building new networks, the telecommunications providers object to local management of public rights-of-way.

Local Jurisdictions Need the Ability to Properly Manage Their Public Rights-of-Way. Although local governments recognize the FCC's concern, the FCC should not limit local authority over rights-of-way. Local governments must be able protect residents needs as telecommunications systems are being built. The FCC should also resist any action to restrict local taxes.

**Local Jurisdictions are in the Best Position to Meet the Community's Needs.** The FCC should not restrict local rights-of-way management, because the District and other local jurisdiction must be ensure safety and avoid unnecessary traffic blockages. The FCC already recognizes management as a role for local government; this should not change. Local governments must strike a balance between the competitive needs of the providers and the needs of the community. The District and other jurisdictions should not be asked to compromise safety and community needs to the desire of telecommunications providers to construct new networks. The District of Columbia, over the last two years, has demonstrated an example of potential rights-of-way harms that could result without the existence of specific constructions. Local jurisdictions must be able control future road construction and resurfacing costs. The construction of networks without management could increase the infrastructure burden for government by causing additional repairs. In fact, rights-of-way management via regulation supports competition. Without regulation and coordination, competitors would run a higher risk of damaging the networks of other providers and utilities.

**Local Jurisdiction Must have a Means to Recover Cost and Value of Used Rights-of-Way.** Telecommunications companies are not unnecessarily burdened by providing additional information within local government applications. Local governments should not be limited to “rights-of-way” related issues in its access applications. Additional information demonstrates whether a company meets or can meet the community’s needs. Local governments should be able to address aesthetic concerns in addition to safety. Residents have valid concerns regarding how different facilities affect their communities. The FCC cannot impose a time limit for the review of applications. Any imposed time limit could hurt governments by allowing situations where providers enter the rights-of-way without a basic review. This would not be in the safety interests of the community.

**Compensation Paid by Telecommunications Providers are Neither Burdensome, nor a Barrier to Competition.** Restrictions upon local governments ability to receive adequate compensation would increase the tax burden for residents. Compensation is needed to maintain the streets after cut are made by utilities. Restriction on compensation risks passing the costs onto the consumers. Current compensation policies do not favor incumbents. All compensation policies are distributed equally. Telecommunications competition already exists in the District. As a result of the entry of new providers, incumbents no longer hold a significant advantage over new providers in terms of rights of way compensation.

**Local Taxes are not an Unreasonable Burden.** FCC has no jurisdiction to preempt taxes. Local taxes are a cost of doing business. No evidence demonstrates that taxes are unduly burdensome. Therefore, it should resist taking any actions to limit local taxes.

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**REPLY COMMENTS OF THE DISTRICT OF COLUMBIA OFFICE OF CABLE  
TELEVISION & TELECOMMUNICATIONS**

## **I. Introduction**

The development of telecommunications competition is a very important national goal. Citizens benefit from having choices in communications. The developments in telecommunications have greatly affected how Americans conduct business and their everyday actions. Citizens have also benefited from the introduction of new telecommunications companies with new services. Their presence has resulted in competitive pricing. Certainly, all local governments encourage new telecommunications entrants and services.

As part of the introduction of competition, telecommunications providers have sought to build networks. Clearly, some providers have objected to the management of rights-of-way by local governments. As a result, the Notice of Inquiry seeks to discover whether the Federal Communications Commission ("FCC") should take further action in local governments' management of rights-of-way. Through the Notice of Inquiry, the FCC expresses concerns regarding requirements that do not relate to rights-of-way and any policies that favor incumbents over new telecommunications service providers.

The District of Columbia concludes that the FCC should not respond to comments in a way that would limit the authority of local governments. No conditions exist for the drastic action of federal preemption. Local governments have the authority to manage their streets and balance the interests of the providers versus community needs. Local governments are in the best position to support competition by managing infrastructure consistent with community needs. Further, governments must be able to meet community needs through recouping reasonable compensation from providers as they take space in the rights-of-way. Local government actions have been neither overly burdensome nor discriminatory. Therefore, the FCC should not take any further action in the management of the rights-of-way.



## **II. Local Jurisdictions Need the Ability to Properly Manage Their Public Rights-of-Way.**

Many telecommunications entrants have come to the District to provide advanced telecommunications services. The District of Columbia and other local governments must be able to manage how the providers operate to avoid unnecessary safety problems and traffic blockages. The FCC acknowledges that local governments are in the best position to control public rights-of-way. It also recognizes that the role of local governments is to preserve rights-of-way in a manner that benefits the public by preserving safety without allowing unnecessary inconveniences and ensuring compensation.<sup>1</sup> Therefore, issues regarding how to improve competition and access to the rights-of-way should be left to the District and other local jurisdictions.

### **A. Balance Exists between Providing Service and Management of Community Property.**

Many telecommunications companies have been eager to build competitive networks in the District of Columbia and surrounding jurisdictions. Their most fundamental needs are access to residents and institutions that reside in the District. Some commenters have complained of the burdens imposed by localities to manage rights-of-way.<sup>2</sup> The District agrees that an important step in the development of telecommunications competition is the construction of wireline networks to access customers. This would promote competition in telephony, cable television and data transmission services. In fact, the District government encourages the implementation of advanced technology services that satisfy the needs of District residents and institutions.

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<sup>1</sup> *Promotion of Competitive Networks in Local Telecommunications, Notice of Proposed Rulemaking and Notice of Inquiry*, FCC 99-141 at ¶ 72 (July 7, 1999) ("NOI").

<sup>2</sup> Comments of Florida Telecommunications Industry Association, Comments of General Communications Corp.

Generally, local governments are pleased, on the behalf of their residents, to observe the development of competition.

However, the provision of technology without proper regulations cannot and should not create chaos. The installation of telecommunications facilities for the District and other communities can mean that blockage and redirection of traffic, outages of other utilities, disrepair to the streets, and injuries to pedestrians and automobiles. The cost of establishing the networks can outweigh the benefit provided to the consumers. The needs of private industry cannot outweigh the ability of the District to provide a continuous flow of transportation and safety. It is in the best interest of residents to avoid such hazards as much as it is to have advance telecommunications services. The District and other governments must have the full authority to prevent such hazards from occurring.

The FCC recognizes that a balance must be struck between managing its rights-of-way to meet community needs without unfairly obstructing the development of competition.<sup>3</sup> The policies of local government achieve the balance by allowing the new entrant access while protecting the everyday needs of residents.

### **Problems in the District**

The increased activity of telecommunications companies has caused difficulties for the District of Columbia government. In the last three years, the amount of construction activity increased substantially as new entrants arrived in the market. In fact, the amount of rights-of-way applications rose from 9,000 to 15, 000 applications in 1998.<sup>4</sup> Companies have continually located their facilities in District rights-of-way. This construction has resulted in the constant

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<sup>3</sup> Id.

<sup>4</sup> Stephen C. Fehr, *Road Kill on the Information Superhighway*, Washington Post, Sunday, March 21, 1999, at A1.

disrepair of local streets by different companies.<sup>5</sup> Construction crews worked at all times including rush hours. This construction has resulted in serious traffic snarls. After the initial construction of their networks, the companies made temporary repairs to the streets. These repairs have been of low quality and have produced potholes. These potholes have caused damage to residents' automobiles.<sup>6</sup> The new construction has resulted in numerous complaints by residents and commuters. The District expects more construction projects to occur within the next two years, including the completion of the Starpower Communications LLC network and the upgrade of the District Cablevision Limited Partnership network.

The District government is obligated to meet residents' needs. It has responded to residents by working toward the implementation of new rights-of-way construction management rules. The purpose of the rules is to cause greater coordination between companies to avoid unnecessary construction projects. The rules will also refine construction standards to ensure higher quality repair work to the streets.

These new rules will ensure effective rights-of-way management while fostering competition in the telecommunications industry. The telecommunications companies will continue to have access to the city streets. The terms of the access are made more reasonable so as to allow safe driving conditions. Although the rules place greater conditions on the providers, they do not cause undue hardship to the corporations. This scenario provides an example of a local government satisfying its community needs without upsetting the competitive environment.

## **B. Local Jurisdictions Must be Able to Control Future Costs**

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<sup>5</sup> See e.g. "A Race to Lay Fiber Cable Tears Up Streets", Washington Post, July 15, 1999, at A1.

<sup>6</sup> See e.g. Lyndsey Layton, "D.C. to Tell Fiber-Optic Firms to Speed It Up", Washington Post, November 10, 1999, at A1.

Local regulations allow governments to avoid unnecessary future construction and resurfacing costs. Construction within the right-of-way without appropriate rules can decrease the useful life streets. The absence of specific construction requirements can hasten the timeframe in which jurisdiction must completely resurface streets. Construction by telecommunications companies also has caused potholes and other large cavities that are repaired by the District and other jurisdictions. The need to provide more frequent repairs increases costs for local governments. These increased costs can be burdensome to the appropriated budgets of the local jurisdictions.

Governments should have no obligation to absorb additional costs while telecommunications companies profit from the use of the rights-of-way. Local jurisdictions with specific construction standards are able to maintain the proper useful life of the rights-of-way without unduly increasing its expenditures for the rights-of-way.

### **C. Rights-of-Way Regulation Supports Competition.**

Commenters have complained that providing vital planning information such as facility maps is unreasonably burdensome.<sup>7</sup> Since governments need to coordinate building projects, these comments lack merit. The introduction of new networks in the public rights-of-way increases the chance that construction can damage existing networks and utilities. Telecommunications installers have caused utility outages and have broken into natural gas lines. Proper management of rights-of-way by local governments protects all telecommunications networks. Although corporations complain about the regulations, these regulations benefit them by protecting their networks.

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<sup>7</sup> Comments of GTE, Comments of SBC.

### **III. Local Jurisdictions are in the Best Position to Meet the Community's Needs.**

The FCC has acknowledged that Local governments must be able “to perform the range of vital tasks necessary to preserve the physical integrity of the streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manages facilities...in the rights-of-way.”<sup>8</sup> Important activities cited include the coordination of construction schedules, determination of insurance, bonding and indemnity requirements, and having current information regarding different systems to prevent interference between them.<sup>9</sup> The federal government recognizes that it does not have the resources to police the entry of new providers and new projects in various jurisdictions.

Based upon the conditions of streets and other considerations, local governments stand in the best position to determine what information or compensation is necessary to meet needs. The federal government is not able to observe the customized needs of each community. Important differences exist in the makeup of various jurisdictions (i.e. population, density, width of streets, weather, and etc.). Because of the federal government's position, it is difficult to second-guess the community's identified needs. The FCC should not try to restrict local governments' ability to assess needs based upon industry comments. There would be no effective federal substitute to local management.

#### **A. Not Burdensome to Receive Additional Information.**

In order to ascertain the fitness of telecommunications providers to construct in local rights-of-way, local governments should be able to obtain the information it deems appropriate. Several commenters want to limit the information that could be provided to governments.<sup>10</sup>

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<sup>8</sup> NOI at ¶ 75.

<sup>9</sup> Id.

<sup>10</sup> See e.g. Comments of AT&T.

Such information should not be limited to information regarding the use of the rights-of-way. For example, financial information can be used to ascertain the financial fitness of companies to complete projects or to provide repairs to the street that meet the local government's standards. Further, the local government is entitled to appropriate insurance and liability information to ensure that companies will be able to provide compensation for construction errors. Detailed information allows the government to ensure that companies can fulfill the community's rights-of-way needs.

The provision of detailed information does not cause any barrier to entry. Although it means that more time is needed to complete the applications, it does not prevent the operators from providing service. Until significant evidence exists that companies are prevented from providing service due to the detail of applications, the FCC should not consider any action to restrict information requested by local governments. It should be observed that no commenter claimed inability to obtain access due to application information.

#### **B. Local Jurisdictions Should be Able to Address Aesthetics.**

Several commenters recommended that local governments should not be able to provide construction restrictions because of aesthetic reasons.<sup>11</sup> Conversely, they suggest that governments should be restricted to safety. Many these commenters are cable television providers that use power supply pedestals.

Although local restrictions may be frustrating, local governments must be able to represent their communities' interests. Many pedestals take up a substantial amount of public space and make noise. These facilities serve as distractions to neighborhoods and communities. Governments must have the ability to craft reasonable restrictions to allow the systems to operate

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<sup>11</sup> Comments of Cox Communications.

while representing the community needs. There is no compelling reason for the FCC to impose restrictions in this arena. Aesthetic concerns are and will remain a primary interests for local communities.

### **C. Time Periods for Application Review**

Commenters have also objected to the timeframe for application reviews.<sup>12</sup> They complain that review periods of over sixty (60) days are burdensome and serve as barriers to entry. The claims of these commenters are not without merit. Local governments should seek to process applications efficiently. However, at times, longer reviews are unavoidable.

Local jurisdictions, at times, are overwhelmed by applications from various providers. In the case of the District, companies have flooded the permitting office. Without additional resources it became difficult to quickly process applications.

Whereas local governments should take steps to avoid logjams for access applications, the federal government should not impose time limits. Time limits would allow access without a thorough review of the provider or coordination with the local jurisdiction, thereby potentially exposing the local government to additional liability. The potential harm of federally imposed time limits would have a far worse impact on residents than initial delays to approve applications for providers. No substantial need exists for the imposition of time limits to be imposed by the FCC.

## **IV. Local Jurisdictions Must have a Means to Recover Cost and Value of Rights-of-Way Used for Telecommunications Purposes.**

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<sup>12</sup> See e.g. Comments of Association for Local Telecommunications Services

The FCC acknowledges that governments are entitled to compensation for use of their rights-of-way.<sup>13</sup> It further acknowledges that most compensation methods are fair. Since local governments use fair means of compensation, the FCC should not preempt the means by which governments gain compensation. Local government compensation methods are used to regain the value of used rights-of-way. Such methods represent fair and reasonable means of obtaining compensation. Restrictions upon compensation policies would greatly hurt local governments.

**A. The Inability to Seek Proper Compensation Would Increase Tax Burden to Citizens.**

Without adequate compensation from telecommunications providers, governments would not be able to cover the costs of street construction or problems that result from the use of public rights-of-way. The local budget of most jurisdictions cannot withstand infrastructure costs to repair streets. The increased need of local governments to repair streets due to telecommunications construction means greater tax burdens to residents. In the District, if adequate compensation from telecommunications providers does not exist, then infrastructure costs have to be absorbed by residents. This results in increased taxes or shifting of funds from other important budgeted priorities. In the alternative, the District or other local jurisdictions would lack finances to make the necessary repairs.

Residents should not be forced to pay additional costs or face burdens due to the deployment by telecommunications companies. The District wants to make itself a hospitable place for residents and businesses. Additional taxes and bad infrastructure serve as a significant disincentive to District residency. The loss of citizens strips the vitality of the District and increases the financial burdens borne by the remaining residents.

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<sup>13</sup> NOI ¶ 72-3.



**V. Compensation Paid by Telecommunications Providers are Neither Burdensome, nor a Barrier to Competition.**

**A. Compensation is not Burdensome to New Telecommunications Entrants.**

It has been suggested by earlier comments that local compensation provisions have been barriers to entry and are discriminatory.<sup>14</sup> While others have argued correctly that no evidence exists of an unreasonable burden to telecommunications providers. The District maintains that its local government compensation methods are neither burdensome nor barriers to entry. Telecommunications companies have increased their presence in the District with knowledge that the District would soon enact more extensive compensation rules. So far, the local telecommunications providers have been driven by market demand for service, not fear of local compensation requirements. The same applies in other jurisdictions. To our knowledge, no company has turned down any clients due to the District's planned Rights-of-Way policy changes. Companies have not been deterred from providing service where rights-of-way compensation methods are strong.

Further, the compensation is proportional to the amount of resources used. In the case of franchise fees, compensation is based upon the amount of benefit that a company derives from a property. Therefore, a new entrant pays less as its business grows. Under a linear foot methodology, a payment is proportional to the physical space used. Therefore, entrant payments relate to the area used. Neither method is burdensome and both offer benefits to new entrants.

**B. Compensation Policies to do not Favor Incumbents.**

The District government agrees that competition will not be helped if its policies favor incumbent providers. Unequal policies would be a disincentive to entrants. Fortunately, the District's rights-of-way compensation methods are applied equally and do not have a

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<sup>14</sup> See e.g. Comments of MCI Worldcom.

discriminatory effect. The District does not assert that most compensation methods discriminate in favor of incumbents. Therefore, FCC intervention is unnecessary.

Under the District's current rights-of-way compensation regulations, the District charges permit fees. These apply the same to any person seeking to construct within the rights-of-way. No agreements exist to protect incumbent providers. As mentioned earlier, the District of Columbia plans to institute new regulations that assess companies based upon the physical space occupied in the rights-of-way. This should also have an equal effect on all companies. New entrants would need to pace their construction based on revenues to avoid financial difficulties.

**District has Established Competition.**

Competitive barriers do not apply to the District because so many competitors have already been able to build wireline services. New entrants, such as e.spire, Starpower, and MFS, have already established themselves into the public right-of-way. This is evidence that this compensation method has not discourage these companies from entry. Therefore, the foundation of communications competition has been established.

**Incumbents No Longer Have Rights-of –Way Advantage.**

Many of the rights-of-way incumbents do not hold financial advantage over the new providers. Many of the networks used by incumbents will be replaced in the coming years to meet consumer demand for more advanced services. Because new providers will spend resources to start their networks and incumbents must spend resources to upgrade their facilities, all companies face similar financial challenges. Since the compensation provisions apply equally to companies in similar financial condition, then the policies are not unequal.

Further, the application of local compensation policies is not unequal in other local jurisdictions. Because competition is occurring in the District and elsewhere, no barrier to competition exists. The FCC should not take any action to restrict compensation required by local governments.

**VI. Local Taxes are not an Unreasonable Burden.**

Although the FCC acknowledged that it has no jurisdiction in preempting taxation, it asked for comments regarding tax burdens.<sup>15</sup> Since the FCC has no jurisdiction to preempt local taxes, it should not make any attempt to change local tax policies or adjust other policies based upon tax considerations.

Companies have complained about gross receipt taxes in the District. However, it is fair because the rate is charged equally to all companies. The taxes are commensurate to the revenue needs of the locality and when applied equally to all persons, they do not give an advantage. Further, taxes are not so burdensome that companies cannot adjust plans to fit the regulatory structure.

**VII. Conclusion**

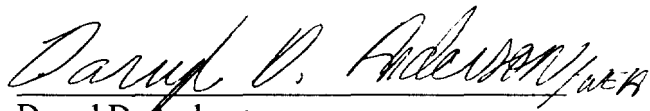
The development of telecommunications will benefit consumers, but it must be controlled. Local jurisdictions have observed the problems that can occur without proper coordination of network construction. Governments have become familiar with the needs of their communities and must be able to protect their communities. No federal substitute exists for the identification of community needs. The development of competition clearly demonstrates that governments are properly maintaining the balance of network development and protecting resident needs. Since providers have not been impeded from providing their services under the existing regulatory scheme, the FCC should not take any action to limit rights-of-way management.

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<sup>15</sup> NOI ¶ 84, Section 601(c)(1) Telecommunications Act of 1996.

Further, governments are entitled to reasonable compensation. The policies used in the District and other jurisdictions have not been overly burdensome or discriminatory. Telecommunications companies have not been halted by compensation policies. In fact, both new and incumbent providers are affected similarly. Therefore, the FCC should not impose any limitations.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Darryl D. Anderson", with a horizontal line drawn underneath it.

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December 13, 1999